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NO. 89-448

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

W. DON WELCH, Executive Director, South Carolina State Ports Authority, HENRY TECKLENBURG, JR., DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, JOSEPH P. GRIFFITH, and HARRY A. CHAPMAN,

Petitioners,

v.

SAMUEL COAKLEY,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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Petitioners have requested a writ of certiorari on the ground that Respondent's discharge by a state agency does not constitute a continuing violation of the United States Constitution necessary

to support Respondent's lawsuit in federal court under the doctrine of Ex parte Young, 209 U.S. 123, 28 S. Ct. 441 (1908). Respondent's memorandum in opposition fails to address Petitioner's argument that the present claim lacks a continuing constitutional violation. Instead, Respondent argues that a suit for reinstatement is permissible because reinstatement is prospective relief. However, this Court has plainly indicated that the form of the requested relief is not the criterion for determining whether a claim may be pursued under Ex parte Young. Papasan v. Allain, 478 U.S. 265, 279, 106 S. Ct. 2932, 2940-41 (1986).

In addition to its failure to address the basis for the petition in

this case, Respondent's memorandum contains several misstatements of fact. First, Respondent asserts that the Fourth Circuit held that "respondent's claim for reinstatement alleged an ongoing constitutional violation . . . ." However, a fair reading of the Fourth Circuit's decision suggests that the court considered the issue of an ongoing violation only in terms of whether prospective relief was appropriate. See Coakley v. Welch, 877 F.2d 304, 307 n.2 (4th Cir. 1989). In addition, Respondent's memorandum (page 6) states as follows:

> [R]espondent asserted a continuing interest in returning to his job, alleged that the violation which keeps him out of his job is continuing, and therefore requested

> an injunction ordering the petitioners to reinstate him as a Ports Authority employee.

Emphasis added. As shown by the attached Complaint, there are no allegations in this case regarding an alleged constitutional violation that is continuing in nature.[1]

Lastly, Respondent's memorandum cites several cases for the proposition that decisions of this Court "have routinely treated reinstatement of state employees as permissible relief." The cited cases clearly do not support this conclusion. See Keyishian v. Board of

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[1] While not totally inaccurate, Respondent's statement that he was discharged after passing a polygraph test may be very misleading since the test was not administered by or on behalf of Petitioners or the South Carolina State Ports Authority.

Regents, 385 U.S. 589, 87 S. Ct. 675 (1967); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694 (1972); Meachum v. Fano, 427 U.S. 215, 96 S. Ct. 2532, reh'g denied, 429 U.S. 873, 97 S. Ct. 191 (1976); and Dixon v. Love, 431 U.S. 105, 97 S. Ct. 1723 (1977). In none of these cases, all of which predate Papasan, is the issue of appropriate relief under Ex parte Young even mentioned. Nor is there a finding in these cases that the defendant is an agency of the state. Only in Keyishian is the plaintiff clearly referred to as a "state" employee rather than a "public" employee. 385 U.S. at 591, 87 S. Ct. at 677. Significantly, however, this case involves a challenge to an unconstitu-

tional statute which clearly distinguishes it from the present claim.

Petitioner again urges this Court to grant certiorari to determine whether this case and others like it allege continuing constitutional violations that constitute exceptions to the state's eleventh amendment immunity.

Respectfully submitted,

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November 20, 1989

ATTACHMENT

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF SOUTH CAROLINA

CHARLESTON DIVISION

SAMUEL COAKLEY, Plaintiff, v. SOUTH CAROLINA STATE PORTS AUTHORITY, W. DON WELCH, Executive Director, and HENRY TECKLENBURG, JR., DON MCELVEEN, ROBERT V. ROYALL, JR., JAMES B. MOORE, THEODORE GUERARD, ERNEST L. WILLIS, JOSEPH P. GRIFFITH, HARRY A. CHAPMAN, and THOMAS F. HARTNETT, Members of the Board of the South Carolina State Ports Authority, Defendants.	)	C.A. No. 2-87-1442-2

COMPLAINT

Introduction

1. This is a suit against the South Carolina States Ports Authority

[hereafter "SPA"] by one of its longtime employees, challenging the termination of his employment because it was based on no just cause and because it was carried out without the fair procedures to which he was entitled under the due process clauses of the Constitution of the United States and the State of South Carolina, and under his employment contract with the SPA.

2. This suit arises under 42 U.S.C. § 1983, and this Court's jurisdiction is based on 28 U.S.C. § 1343. This Court has pendent jurisdiction over the state law claims.

Parties

3. Plaintiff Samuel Coakley is a citizen of the United States and the State of South Carolina, and a resident of Charleston County. Until the events

described in this complaint, he was employed by defendant SPA.

4. Defendant SPA is a public body chartered by the State of South Carolina for the purpose of carrying out the State's commercial activities in the importing and exporting of goods through the ports of Charleston and other cities. It carries these functions out by using its employees to transfer goods between vessels and docks maintained by SPA; the transfer of goods between the docks and inland carriers is done by longshoremen who are employed by private companies. Under S.C. Code § 54-3-140(1), SPA has the right to sue and be sued, while under S.C. Code § 54-3-140(9), SPA must be self-supporting from its commercial revenues, because it is not authorized to have any debts paid from state funds.

5. Defendant Welch was and is the Executive Director of SPA, and is responsible for its operation, including personnel decisions. The other individual defendants are the members of the SPA board and have ultimate supervisory responsibility for SPA operations. All except defendants Willis, Hartnett, and Guerard were members of the Board at the time of the events alleged in this Complaint.

6. At all times relevant, all defendants were acting under color of state law. All defendants are sued in their official capacities, not their individual capacities.

Facts

7. Plaintiff Coakley began working for SPA in 1972, as a cargo handler, an entry level job. He per-

formed his duties satisfactorily and was promoted, first to lift operator and then to cargo supervisor. All these jobs entailed duties involving the transfer of goods from dock warehouses to vessels, and vice versa.

8. Under SPA regulations, as well as the Constitution and laws of the United States and South Carolina, a non-probationary employee of SPA is entitled not to be terminated except for cause and except upon fair procedures.

9. In December, 1986, he was accused by three truck drivers of charging them money on December 9, 1986, in order to get their truck unloaded. The accusation was untrue.

10. About December 11, 1986, he was suspended without pay based on these charges. On December 16, 1986, he re-

ceived a letter from SPA telling him he was terminated.

11. During this period, the only effort to check with plaintiff was by a security guard assigned to investigate, who told plaintiff that several truck drivers had accused him of taking money and asked plaintiff whether it was true, to which plaintiff answered that it was untrue. On information and belief, the security guard also interviewed one of the accusing truck drivers, and presented a report of his investigation, without findings or recommendations, to other SPA officials.

12. On information and belief, the decision to terminate plaintiff was made by one or more SPA officials who never spoke to plaintiff or to the accusing truck drivers, and without giving plain-

tiff an adequate opportunity to rebut the charges.

13. In fact, shortly after plaintiff was terminated, he took and successfully passed a polygraph test and presented the report to SPA officials in hopes of changing their minds, but to no avail.

State Agency Decision

14. Following his termination, plaintiff filed a claim for unemployment compensation with the South Carolina Employment Security Commission. In his application, he described the reason given for his termination, and denied the accusation.

15. The SPA filed an answer challenging plaintiff's right to receive unemployment compensation on the ground that he had been discharged for charg-

ing truck drivers to unload their trucks, which would have constituted "misconduct" disqualifying plaintiff from receiving benefits.

16. On January 23, 1987, the Employment Security Commission made its initial decision holding plaintiff entitled to benefits on the ground that SPA had presented no evidence supporting its claim that he had been guilty of misconduct. See attached Exhibit A, which is incorporated in this complaint.

17. SPA appealed this initial decision to the Appeals Tribunal, at which stage an evidentiary hearing was scheduled (pursuant to Commission procedures as established by law) at which both the employee-claimant (plaintiff) and the employer (SPA) had the opportunity to present witnesses and other evidence.

17. The hearing on SPA's appeal was scheduled for February 18, 1987, and both the plaintiff and the SPA received notice of the time and place of the hearing. At that time, the plaintiff was present and ready to go forward, but SPA chose not to appear. Accordingly, on March 4, 1987, the Appeals Tribunal issued its decision upholding plaintiff's right to receive compensation notwithstanding SPA's accusation that he had been terminated for misconduct. See attached Exhibit B, which is incorporated in this complaint.

19. On March 14, 1987, that decision became the final decision of the Employment Security Commission.

20. Under the laws of South Carolina, the findings and decisions of the Employment Security Commission are con-

clusive and preclude relitigation of the matters involved in any judicial or other proceeding.

Internal SPA Grievance

21. Shortly after filing his unemployment compensation claim with the Employment Security Commission, plaintiff also filed a timely grievance pursuant to SPA regulations. The first step of the grievance was heard by the same official who, on information and belief, had made the decision to terminate plaintiff. This official denied plaintiff's grievance.

22. Plaintiff then filed a timely appeal to the next step of the grievance process. That step, according to SPA regulations, called for plaintiff to have a hearing before a Grievance Panel which would hear live testimony and

which would recommend a decision to the Executive Director.

23. Plaintiff objected to certain aspects of the procedure as being unfair, two in particular:

(a) Plaintiff's counsel would not be allowed to participate at the Grievance Panel hearing. Instead, plaintiff was entitled only to select as his "advocate" a staff member of the SPA Employee Relations Department. On information and belief, the Director of the Employee Relations Department was one of the SPA officials involved in the decisions to suspend and then to terminate plaintiff.

(b) the Grievance Panel's decision following the hearing would be kept secret from plaintiff, so that in presenting his arguments to the Execu-

tive Director (or his designee), plaintiff would have no idea what recommendation he was discussing, and whether it had been favorable or unfavorable, and why.

(c) Plaintiff wrote to SPA officials before the hearing to complain about these procedures, but his objections were denied. Plaintiff also requested that the accusing truck drivers be invited to take polygraph tests as he had, but this request was also denied.

24. The Grievance Panel hearing was held on February 5, 1987. At that hearing, two of the truck drivers testified against plaintiff, and he testified in his behalf. Plaintiff's case was conducted entirely by the SPA Employee Relations Department staff member, and plaintiff's counsel was allowed to

attend but was not allowed to speak during the hearing.

25. Following the hearing, the Grievance Panel presumably decided on a recommendation, but plaintiff has no idea what the recommendation was or what it was based on. To this day, the recommendation remains a secret from plaintiff.

26. On February 17, 1987, plaintiff appeared before the Deputy Director of SPA who, on information and belief, had been delegated by defendant Welch with the responsibility for making the final decision. The Deputy Director said he had the Grievance Panel's decision, but gave no hint of what was in it, thus leaving plaintiff at a loss to know what issues to address or what there was to rely on or to try to over-

come. On February 19, 1987, plaintiff was notified by the Deputy Director that his termination had been upheld.

27. No further appeal was provided in the SPA Handbook or the SPA procedures.

28. Both at the Grievance Panel hearing and before the Deputy Director, plaintiff indicated that he had filed a claim with the Employment Security Commission, that SPA had controverted that claim, and that his claim had been thus far upheld by the Employment Security Commission, and argued that SPA was obligated to defer to the Employment Security Commission's decision.

Causes of Action -- Federal

29. First Cause of Action -- Preclusion. Since the Employment Security Commission found no evidence that plain-

tiff had committed the acts with which SPA charged him, and held that plaintiff had not been guilty of misconduct, and since relitigation of those matters is barred by state law, relitigation is likewise barred by federal law, under 28 U.S.C. sec. 1738.

30. Accordingly, as a matter of law, plaintiff did not commit the acts with which the SPA charged him, he was not guilty of misconduct, and therefore he was fired without cause, in violation of the due process clause of the fourteenth amendment to the Constitution of the United States.

31. Second Cause of Action -- Pre-termination due process. Before being terminated by a public employer, plaintiff was entitled to a meaningful opportunity to respond to the charges before

the person making the decision. Although the opportunity need not be very formal, the brief interview with a security guard, who did not make the decision, fell below what was required.

32. Accordingly, the termination of plaintiff without an adequate pre-termination opportunity to respond to the charges violated his right to due process as required by the fourteenth amendment to the Constitution of the United States.

33. Third Cause of Action -- Post-termination due process. A public employee who is terminated is entitled to a full due process procedure and hearing at some point either before termination or promptly after termination. The procedure must have certain fundamental characteristics, including disinterested

decision-makers, a hearing with a right to counsel, and cross-examination, a decision based on the evidence, and a statement of reasons by the hearing body based on that evidence. The grievance procedure afforded to plaintiff here, which included a bobtailed right to "representation" by a member of the employer's staff and a secret recommendation, was little more than a continuation of SPA's internal process of terminating plaintiff, and fell far short of the fundamental requirements of due process.

34. Accordingly, the termination of plaintiff without full due process at any point before or after termination, violated his right to due process as required by the fourteenth amendment to the Constitution of the United States.

Causes of Action -- State (Pendent)

35. Fourth Cause of Action -- State law preclusion. The elements of the First Cause of Action also establish that relitigation is precluded for purposes of state law, so that as a matter of state law plaintiff was terminated without cause, in violation of the due process clause of the South Carolina Constitution, Art. I, Sec. 3.

35. Fifth Cause of Action -- State due process. The elements of the Second and Third Causes of Action also establish that plaintiff was denied State constitutional due process at both the pre-termination and post-termination stages, in violation of the due process clause of the South Carolina Constitution, Art. I, Sec. 3.

37. Sixth Cause of Action -- State contract law. The elements of the foregoing Causes of Action also establish that plaintiff was terminated without cause and without procedural due process, in violation of his contract with SPA.

38. This Court has pendent jurisdiction over the State Causes of Action.

Immunity

39. Although SPA is a state body, it does not draw on the State treasury, it engages in a commercial activity, is authorized to sue and be sued, and accordingly, for these and other reasons, SPA is not immune from suit at law or in equity under either the 11th amendment to the Constitution of the United States or the doctrine of sovereign immunity.

Equity

40. By being deprived of his livelihood, based on a charge suggesting moral turpitude, plaintiff has suffered irreparable injury for which his remedy at law is or may be inadequate. An injunction and related equitable relief are necessary in order to provide an adequate remedy for plaintiff's injuries.

Jury Trial

41. Plaintiff demands a trial by jury.

Relief

42. Plaintiff prays for the following relief:

(a) a declaration that he was terminated without cause, and that he was denied procedural due process at both the pre-termination and post-termination stages;

(b) an injunction requiring the defendants to reinstate him as an SPA employee with full seniority and restoration of lost wages and other benefits;

(c) an award of compensatory damages from the defendants in their official capacities, to compensate him for loss of his employment and deprivation of his constitutional rights;

(d) costs and attorneys' fees;

(e) such other relief as this Court deems appropriate.

Respectfully submitted,

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June 1, 1987

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